

Control of abusive practices in the digital platform economy

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The Monopolies Commission is a permanent, independent expert committee which advises the German government and legislature in the areas of competition policy-making, competition law and regulation. Its legal responsibilities encompass, among others, the preparation of a Biennial Report analysing the development of competition on a biannual basis. The Monopolies Commission has five Members appointed by the Federal President based on a proposal of the German government. Prof. Achim Wambach, Ph.D., is the chairman of the Monopolies Commission.

Chapter I

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Summary

The German Presidency of the Council of the European Union offers Germany an opportunity to actively contribute to shaping the further development of the European **regulatory framework for digital markets** envisaged by the European Commission. The political objective of more effectively tackling competition problems in these markets has been framed both at national and EU level. Abuse of market power by online platform companies should be penalised more effectively and more quickly, proceedings under competition law facilitated or expedited to this end and, where necessary, regulatory instruments developed to protect platform users. With a view to these objectives, possible solutions have been developed in a number of expert opinions, which the Monopolies Commission supplements in this Report with its own considerations and recommendations.

There are a number of issues in relation to **market power-related competition problems**, namely defining criteria to determine the market power of digital platforms, the procedures to be taken when behaviour causes the market to tip permanently in favour of one platform or creates more or less unassailable “ecosystems”, and the procedures to be taken if the market structure has consolidated permanently in favour of one platform. As regards the criteria to determine the market power of digital platforms, the existing principles of Article 102 TFEU appear to be sufficient, notwithstanding reforms currently under way at national level.

A provision has been proposed in Germany concerning the **problem of market “tipping”** (section 20 (3) (a) of the draft bill for a Competition Law Digitisation Act, 10th amendment to the German Competition Act) (Referententwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, GWB-E), which would enable the competition authorities to take action as soon as there is a risk to competition, regardless of whether there is evidence of any specific effects of the behaviour in question. The intended provision could also be used to take action against European platform companies operating in Germany whose behaviour may contribute to the tipping of markets. The Monopolies Commission therefore recommends **observing German application practice** in the first instance and possibly building on this to consider provisions for European law.

Concerning the **problem of “ecosystem” creation**, the prohibition on abuse of a dominant position enshrined in **Article 102 TFEU appears to be sufficient in principle**. The new provision proposed in Germany to prevent abuse by companies with “paramount cross-market significance” for competition (section 19 (a) GWB-E) differs from Article 102 TFEU in a number of ways. From the point of view of European Union law, however, experience of this new provision could be informative in two ways. Where the competition authorities of the Member States or national courts have an obligation to apply Article 102 TFEU in addition to and alongside national competition law (Article 3 (1) sentence 2 of Council Regulation (EC) No 1/2003), it will become apparent whether the **German revision** facilitates or hinders abuse control. Where its scope goes beyond Article 102 TFEU, it will **become apparent whether it is likely to effectively close regulatory gaps at European Union level which may not previously have been recognised**. In this context, the Monopolies Commission considers it advisable to gain practical experience first before setting out to amend European legislation.

Given that the **market position of gatekeepers can be consolidated permanently following the tipping of the market or as a result of the formation of ecosystems**, proposals have been made in a number of expert reports. One proposal was to place an obligation on dominant platform companies to furnish proof that they do not abuse a dominant position within the meaning of Article 102 TFEU. Another approach was to subject dominant online platform companies to additional obligations specified in detail and to stricter control. The Monopolies Commission considers the second approach in particular to be conducive to achieving the aims in question and makes **proposals for a new platform regulation to be adopted**. This should include **a code of conduct for dominant platforms**. Provision could be made to prohibit dominant online platforms from giving preferential treatment to their own services and to impose stricter interoperability and portability obligations coordinated with experience of data protection legislation. In addition, the regulation could adopt **injunctive relief provisions to deal with market abuse with durable effects on the market structure and infringements of additional obligations of dominant platform companies specified in the platform regulation**. The injunctive relief provisions should also specify the conditions under which a sale of sections of the business (also, for example in the form of enforced access to algorithms or data) may be

proportionate and the features the section concerned must then have (for example, a viable and competitive business, admissibility of alternatives, non-acquisition clauses).

In addition to the described market power-related problems, **information-related problems** hindering the effective practical protection of competition may become apparent in platform markets. On the one hand, there is an information gap in the relationship between platform companies and outsiders (public authorities and commercial/non-commercial platform users). On the other hand, there are information problems in online marketplaces (for example retail and booking portals) in the relationship between merchants and consumers.

The Monopolies Commission sees an additional need for regulation in the relationship between platform companies and outsiders, particularly with regard to the **information gap between platform companies and investigating authorities**. Although the authorities have extensive powers of information, they may encounter considerable difficulties when using them in proceedings. The Monopolies Commission therefore recommends **tightening the procedural obligation to cooperate** in cases where the authorities have made all reasonable investigative efforts. If in such cases companies do not disclose information on their own initiative, they can prevent the **investigation of factual evidence** without the privilege against self-incrimination under Community law taking effect. In the context of their free assessment of evidence, the authorities should be authorised to draw conclusions from a lack of cooperation in such cases.

With regard to the **merchant-consumer relationship in online marketplaces**, it appears desirable to specify more precisely the evaluation criteria for automatised pricing by online merchants using price algorithms. In the revision of the Commission Notice on the definition of relevant market, the Monopolies Commission recommends paying **attention to market definition** in online marketplaces **insofar as price differences between merchants in these marketplaces indicate that the relevant markets are becoming more fragmented**. It also recommends introducing a **statutory presumption of loss or damage** to effectively protect consumers against damage resulting from automatically determined and excessive prices within the meaning of Article 102 TFEU.

1 Introduction

45. Digitisation has led to accelerations in all areas of life.¹ That includes the possibility of performing business transactions considerably faster than before. However, it has become apparent that markets can also be damaged more quickly. Particularly in connection with platform-based business models, durable dominant positions may be created, extending beyond traditional market boundaries.² The competitive problems associated with this make the control of abusive practices at European level particularly challenging due to the possibilities of swiftly adapting digital services and also of often virtually unlimited geographic markets.³

46. The German Presidency of the Council of the European Union that began on 1 July 2020 offers Germany the opportunity to tackle the further development of the European regulatory framework for digital markets. The political objective of enforcing competition rules more effectively vis-à-vis and on large digital platforms has been framed both at national and EU level.

47. The Coalition Agreement of the German government coalition states the following:

“We want to supplement competition law for digital business models. We want to appreciably expedite proceedings in general competition law without thereby limiting constitutional guarantees. [...] Alongside general competition law, we need more competent and more active systematic market observation. The competition authority must be able to swiftly and effectively stop abuse of market power, particularly in fast-changing markets. To this end, we will further develop competition authority control, particularly with regard to abuse by platform companies.”⁴

In order to implement this coalition agreement, amendments to the German Act against Restraints of Competition - German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen - GWB) are planned, including the introduction of a platform-specific definition of market dominance (“intermediation power”) and abuse rules in connection with the tipping of platform markets and the development of platform ecosystems.⁵ The German Federal Ministry for Economic Affairs and Energy has also deployed a commission to further develop European competition law. It has submitted further-reaching proposals, also regarding the regulatory framework for dealing with already entrenched market positions of platforms.⁶

48. In summer 2020, the European Commission launched public consultations on a New Competition Tool and a Digital Services Act package.⁷ The Commission has put up four options for discussion in relation to the New Com-

¹ Cf. Monopolies Commission, Special Report 68, Wettbewerbspolitik: Herausforderung digitale Märkte (Monopolies Commission, Special Report 68, Competition policy: The challenge of digital markets), Baden-Baden 2015, paras 16 ff., in particular para. 19 (on acceleration resulting from reduced transaction or information costs).

² Kommission Wettbewerbsrecht 4.0, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, Abschlussbericht (Report by the Commission ‘Competition Law 4.0’, A New Competition Framework for the Digital Economy), 9 September 2019, pp. 1, 13; Monopolies Commission, Special Report 68, *ibid.*, paras 1, 4, 6 ff., 15 ff.

³ Cf. Monopolies Commission Policy Brief 4, 10. GWB-Novelle – Herausforderungen auf digitalen und regionalen Märkten begegnen! (Monopolies Commission, Policy Brief No 4, 10th amendment to the Competition Act – meeting challenges in digital and regional markets!), January 2020, pp. 1-2.

⁴ Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land (A New Awakening for Europe, a New Dynamic for Germany, a New Cohesion for Our Country). Coalition agreement between the CDU, CSU and SPD, 19th legislative period, 2018, lines 2756 ff.

⁵ Federal Ministry for Economic Affairs and Energy, Referentenentwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 - GWB-Digitalisierungsgesetz (draft bill for a Tenth Amendment to the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 - Competition Law Digitisation Act) processing status: 24 January 2020, 9:32 hrs. (hereinafter: draft bill), January 2020.

⁶ Kommission Wettbewerbsrecht 4.0, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, Abschlussbericht, 9 September 2019; <https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/bericht-der-kommission-wettbewerbsrecht-4-0.html> (retrieved on 8 May 2020).

⁷ EU Commission, Proposal for a regulation: New competition tool, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool>; Proposal for a regulation: Digital Services Act package: ex ante regulatory instrument

petition Tool. All of these are intended to allow intervention without establishing that there has been an infringement of competition rules under Article 102 TFEU. Option 1 would allow the Commission to intervene in cases where a dominant company is threatening to foreclose competitors or raise their costs. Intervention could result in behavioural or structural remedies. Option 2 would limit the power described to certain business sectors (for example, “digital or digitally-enabled markets”. In the case of option 3, power to intervene would exist independently from a dominant position if there is a structural risk for competition (particularly a risk of the market tipping) or a structural lack of competition (particularly in markets with structurally secured monopolies; oligopolies liable to market coordination). Option 4 would again limit the power to certain economic sectors.

49. The Digital Services Act package would aim to keep the markets affected by large platform ecosystems open to competition (contestable). To this end, the existing regulation 2019/1150 could be supplemented by conduct-related obligations for all recorded online platform companies (such as prohibitions on giving preferential treatment to one’s own services, data access obligations, standards for terms of use) and supervisory, enforcement and transparency rules.⁸ Another possibility, not necessarily to be seen separately, would be to authorise an EU-level authority to undertake the targeted collection of information from certain gatekeepers.⁹ A third variation would be a preventive regulatory framework for the platforms concerned that prohibits certain conduct (“blacklisted practices”), which could also include remedies tailored to individual cases (for example data access and interoperability obligations).

50. What these considerations have in common is that at best, concentration of power in digital markets is prevented to a greater extent than previously, or at least its effects are to be better controlled. To achieve this, abuse by digital market gatekeepers (online platform companies) should be penalised more effectively and more quickly, proceedings under competition law facilitated or expedited to this end, and, where necessary, accompanying regulatory instruments developed.

51. Implementing these demands requires an understanding of the special features of the market power of digital platforms, but also of information problems existing in the platform economy (section 2). Approaches have already been developed on this basis in a number of expert reports, which the Monopolies Commission supplements with its own considerations and recommendations in this Report (sections 3 and 4).¹⁰ Taken together, an agenda emerges, pursuit of which during the German Presidency of the Council of the European Union could contribute to making the European regulatory framework for dominant platform companies more effective (section 5).

2 Special features of the platforms’ market power and information problems in the platform economy

52. The business model of online platform companies’ is characterised by the platforms targeting their services at different user groups who interact with one another through the platform. Platforms act as an intermediary between user groups, but not necessarily between “relevant” markets. That means that platforms such as social

of very large online platforms acting as gatekeepers, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers> ; both retrieved on 4 June 2020.

⁸ Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services, OJ L 186 of 11 July 2019, p. 57.

⁹ Cf. also previous considerations at European Commission level to shift the burden of proof in relation to infringements of competition law; details are to be found in Espinoza/Fleming, Margrethe Vestager eyes toughening ‘burden of proof’ for Big Tech, *Financial Times* of 30 October 2019; Crofts/Hirst, Vestager pledges to tame tech’s ‘dark side’ in second EU mandate, *MLex* of 27 November 2019.

¹⁰ See Kommission Wettbewerbsrecht 4.0, *ibid.*; Crémer/de Montjoye/Schweitzer, Competition policy for the digital era, Final Report, 2019; Schweitzer/Haucap/Kerber/Welker, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen (Modernising the law on abuse of market power), Report of 29 August 2018; UK Digital Competition Expert Panel, Unlocking digital competition, Report of March 2019 (the Furman Report).

networks can act as an intermediary between users of the same type (“one-sided”).¹¹ However, they can also stand between different user groups that either offer or seek online contents, as in the case of search or trade platforms (“multi-sided”).¹² In both cases, platforms offer users the opportunity to engage in direct¹³ exchange with one another. This opportunity for users to engage in direct exchange means that users may concentrate on a certain platform. This is because a platform that has many users in a market may become even more attractive for other users, either of the same user group (direct network effect) or another group (indirect network effect).¹⁴ The extent to which such network effects may promote concentration depends on other factors, however, namely the platform’s possibility to benefit from economies of scale, users’ possibilities for multi-homing and the effort required for them to switch, the platform’s possibilities for differentiation and user heterogeneity.¹⁵

53. In the context of assessments of competition, the fact that platforms act as intermediaries makes it necessary to adapt the traditional approach to ascertaining market power. In determining market power, the authorities and courts traditionally make a two-phase assessment, first determining the market situation (facts) and then making an evaluation (legal assessment). During the first phase, the authorities and courts define the “relevant” markets for their assessment of competition and determine the facts required for judging the market position of the company concerned.¹⁶ In the second phase, the authorities and courts assess whether the company concerned has a dominant position that may have negative effects on the markets concerned.¹⁷

54. In the case of platforms, however, a modified assessment must be carried out to take account of the platform’s position as an intermediary. Since platforms act as intermediaries, the instruments for market definition in the first phase of assessment cannot be applied to platform activities at all, or at best only to a limited extent. This is because the platform concerned gives the users it targets with the service it offers a possibility to make direct contact with one another. In so doing, firstly, it may make sense for it to request something in return (“price”) from only one user side. Secondly, it has no informational value for the purpose of market definition when services are provided free of charge in direct communication between one user side and the other (as is the case, for example, when providing online contents free of charge). In particular, the Small but Significant Non-transitory Increase in Prices (SSNIP) test, which defines the relevant market by determining whether customers would switch to other products if product prices increase, is hardly applicable to such circumstances. Under certain circumstances, the German Federal Cartel Office (FCO) has therefore started to take an overall view of all sides of a platform when

¹¹ Cf. section 18 (3) (a) no. 2 GWB.

¹² Cf. section 18 (3) (a) no. 1 GWB.

¹³ That is to say that the platform is not part of a sales structure since it does not acquire any goods from users on one side of the platform for resale to users on the other, taking the associated commercial risk; cf. definition of Article 1 (1) (a) of Commission Regulation (EU) No. 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102 of 23 April 2010, p. 1; concerning the criterion of commercial risks, cf. also European Commission, Guidelines for Vertical Restraints, OJ C 130 of 19 May 2010, p. 1 paras 12 ff. For the definition used here, compare also, for example, FCO, decision of 22 October 2015, B 6-57/15 – Dating platforms, para. 72.

¹⁴ Cf. FCO, decision of 22 October 2015, B 6-57/15 – Dating platforms, para. 74; Monopolies Commission, Special Report 68, *ibid.*, paras 36 ff.

¹⁵ Section 18 (3) (a) GWB; see also Evans/Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, *Competition Policy International* 3 (1), 2007, pp. 151–179; on this subject, see also Monopolies Commission, Special Report 68, 1st edition 2015, paras 45 ff. For case practice, see, for example, FCO, decision of 22 October 2015, B6-57/15 – Dating platforms, para. 140 et. seq.; decision of 23 November 2017, B6-35/17 – CTS Eventim/Four Artists, paras 93, 94 ff., 143 ff.

¹⁶ Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372 of 9 December 1997, p. 5, paras 7-8.

¹⁷ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45 of 24 February 2009, p. 7, paras 9 ff.

evaluating the market power of a platform service provider.¹⁸ This overview also allows to take into account the (positive or negative) network effects in the context of user interaction.¹⁹

55. The room for manoeuvre to be assessed in the second phase may be correctly deduced from the extent of dependence of user groups on the offer of a specific platform and the likelihood of potential competitors entering the market.²⁰ The dependence of user groups can be determined by assessing the likelihood of concentration tendencies brought about by the platform's offer being challenged in the future. This requires an overview of the factors that influence whether the platform's market position can be challenged. Such an overview thus includes factors that make the platform attractive (and thus may create network effects) if at the same time it becomes less likely that users (could) switch to other suppliers.²¹ Stabilisation of market concentration may then result from an interaction of tendencies towards concentration and other factors, for example exclusive data access by the platform operator or the development of a closed circuit and cross-market services.²² The central aspect for assuming the existence of a room for manoeuvre based on market power is that (potential) competitors cannot entice users away with alternative offers, so that the platform operator's market position is no longer contestable.²³

56. Particularly online platform companies with a data-based business model gain their market power not only from potentially strong (direct and indirect) network effects, but also from the competitive relevance of the aggregate data on the platform. This applies at least when the platform can use the data to the exclusion of other market participants. The larger a platform's available database, the better the platform can tailor its intermediation service to user needs.²⁴ However, the more relevant data a platform has in relation to its competitors, the more difficult it is for others to compete with the platform. The size of the platform's database thus has both positive effects for its users and negative effects due to reduced competition.

57. The competition problems caused by large online platforms may be of a structural nature and may manifest themselves in two ways:

- The market may tip in the platform's favour, making the platform's market position permanently incontestable.
- Platforms may transfer their market power to other markets to create more or less incontestable "ecosystems".²⁵

For their part, platform-based ecosystems are ambivalent.²⁶ On the one hand, platform users benefit from a range of coordinated products as well as from the fact that the ecosystem is also attractive for other users. On the other

¹⁸ FCO, decision of 22 October 2015, B6-57/15 – Dating platforms, paras 71 ff., 129 ff.; decision of 23 November 2017, B6-35/17 – CTS Eventim/Four Artists; also Monopolies Commission, XXII. Biennial Report, Wettbewerb 2018 (Biennial Report XXII: Competition 2018) 1st edition 2018, paras 605 ff.

¹⁹ There may be negative network effects, for example in the relationship between consumers and suppliers of advertising contents.

²⁰ Federal Court of Justice (Bundesgerichtshof, BGH), judgment of 8 October 2019, KZR 73/17 – Ad blocking III, headnote (b) and paras 23 ff., 28 ff.; for more details see also paras 371 ff. in this Biennial Report.

²¹ Network effects are factors showing efficiencies which may also be relevant for assessing market position. To this extent, the situation differs from that of non-platform companies; cf. on the one hand European Court of Justice (ECJ), judgment of 27 March 2012, C-209/10 – Post Danmark, ECLI:EU:C:2012:172, paras 21, 25, 41 ff.; on the other hand, ECJ, judgment of 17 September 2007, T-201/04 – Microsoft, Reports of Cases 2007, II-3601, ECLI:EU:T:2007:289, paras 1061-1067.

²² Cf. again section 18 (3) (a) GWB.

²³ On this subject, see, for example FCO, decision of 22 October 2015, B6-57/15 – Dating platforms, paras 168 ff.; Federal Court of Justice, judgment of 8 October 2019, KZR 73/17 – Ad blocking III, headnote (b) and paras 28 ff.

²⁴ Cf. for example Commission decision of 27 June 2017, AT.39740 – Google Search (Shopping), para. 158; FCO, decision of 6 February 2019, B6-22/16 – Facebook, para. 496. Data allowing conclusions to be drawn on user behaviour are of particular relevance in this context.

²⁵ European Commission, New Competition Tool, Inception Impact Assessment, Ref. Ares(2020)2836004 – 02/06/2020, p. 2; Monopolies Commission, Policy Brief No 4, *ibid.*, pp. 2-3.

hand, such an ecosystem may significantly impair competition from outside the ecosystem. When consumers are already tied to a dominant supplier's ecosystem, it is more difficult for competitors to find customers for alternative offers.

58. The fact that, as intermediaries, large online platforms comprise a central infrastructure for their users also has the structural effect that the platforms can influence and shape market organisation. The report compiled for the European Commission "Competition policy for the digital era" therefore underlines that platforms may act as rule-setters.²⁷ This could justify subjecting dominant platforms to stricter behavioural requirements than other dominant companies. According to European case-law, such companies have a "special responsibility" *per se* not to allow their conduct to further harm the market structure.²⁸ The authors of the report consider the operators of dominant platforms to have a further responsibility for ensuring that competition on the platforms is fair, unbiased, and pro-users.²⁹

59. Another feature of the platform economy is access to information.³⁰ Online platform companies with a data-based business model in particular may have access to information advantages on account of their possibly exclusive access to data, both *vis-à-vis* their users and *vis-à-vis* the authorities.³¹ The authorities have extensive powers to obtain information in administrative proceedings. However, as outsiders, it may be difficult for them to understand the purposes for which a dominant platform company uses the data available to it. Apart from that, the market conditions in digital markets may change rapidly and the market participants constantly adapt their behaviour to changing circumstances. This exacerbates difficulties that may arise during the assessment of the facts by the authority (moving target).

60. However, an information gap exists not only between the platform company and outsiders, but, particularly within online marketplaces, may also develop between platform users on the merchant side and consumers. Particularly with a view to the algorithmic pricing of many online merchants, it is presumed that this may take place to the detriment of consumers, either due to price discrimination or through price coordination harmful to consumers (collusion).³²

3 Approaches to a solution to the problems relating to market power

61. Approaches to resolving a number of the problems described above have been developed in the reports and in the context of the tenth amendment to the Act against Restraints of Competition (Competition Law Digitisation Act). These relate to the conditions for determining market dominance in platform markets and to abusive practices that tip markets permanently or lead to the formation of incontestable ecosystems. At EU level, however, the problems can be dealt with already, at least in part, by applying the existing Articles 101 and 102 TFEU. Further development of the European legal framework is only necessary where these rules do not completely cover the problems described.

²⁶ The term "ecosystem" covers cross-market structures within which data from different markets are collated by one or possibly a number of companies on (technical) platforms and users are offered complementary services on this basis; cf. Kommission Wettbewerbsrecht 4.0, *ibid.*, pp. 17 ff.; also in this Biennial Report para. 382 with fn. 179 [on the Google Android case].

²⁷ Crémer/de Montjoye/Schweitzer, *ibid.*, pp. 60 ff.

²⁸ See ECJ, judgment of 9 November 1983, 322/81 – Michelin, Reports of Cases 1983, 3461, ECLI:EU:C:1983:313, para. 57.

²⁹ Crémer/de Montjoye/Schweitzer, *ibid.*, p. 61.

³⁰ Crémer/de Montjoye/Schweitzer, *ibid.*, pp. 63-64 (section: "Transparency is also a competition policy issue").

³¹ Cf. Monopolies Commission, Policy Brief, No 4, *ibid.*, p. 5.

³² On this subject, see Monopolies Commission, XXII. Biennial Report, Wettbewerb 2018, Baden-Baden 2018, paras 164 ff.

3.1 Determining the market power of digital platforms – existing principles relating to Article 102 TFEU are sufficient

62. The specificities of the practical determination of the market power of online platform companies described above are unlikely to require any change at EU level in the legal standards of Article 102 TFEU (abuse control) or European merger control. The concept of intermediation power is being discussed in Germany to make it easier to determine platforms' market power. However, this concept is also compatible with the definition of dominant position of the European Court of Justice without requiring an amendment to the existing rules.

63. The concept of intermediation power was proposed in a report commissioned by the Federal Ministry for Economic Affairs and Energy on "Modernising the law on abuse of market power".³³ Its considerations were also taken up in a report compiled shortly afterwards for the European Commission.³⁴ The authors of the Federal Ministry report base the concept of intermediation power mainly on the following observations:

- "The more digital platforms bundle demand for goods or services [...], the more dependent suppliers of goods or services may become on the intermediation services of these platforms for access to the opposite side of the market."
- Moreover, "due to information asymmetries not corrected in the market, intermediation platforms [...] often have a scope of action not controlled by competition".
- In addition, "the increasing significance of such intermediaries for demanders of products or services corresponds to a growing dependence of suppliers".³⁵

In summary, the key aspect of the concept of intermediation power is that the platform company is an intermediary between user groups, which may open up a room for manoeuvre resulting from the dependence of platform users.³⁶

64. The European Court of Justice developed the following definition of "dominant position" for the prohibition of abuse of market power in Article 102 TFEU early on and has since continued to develop it in its case-law, which also claims validity beyond the field of abuse law³⁷:

*"The dominant position referred to in this Article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."*³⁸

This definition does not necessarily require relevant markets to be defined where the dominant company has the scope of action to act independently from other market participants.³⁹ Only relevant markets where competition is impeded need to be defined. Thus, it also does not matter that the platforms stand between user groups. The only decisive factor is the effect of their behaviour on the relevant markets where users are in direct communication with one another or on third markets. Any possible dependencies of users on the platform which prevent them switching to alternative offers can be taken into account in this context.

³³ Schweitzer/Haucap/Kerber/Welker, *ibid.*, p. 42-43, pp. 66 ff.

³⁴ Crémer/de Montjoye/Schweitzer, *ibid.*, p. 49.

³⁵ Schweitzer/Haucap/Kerber/Welker, *ibid.*, pp. 42-43, p. 66.

³⁶ Monopolies Commission, Policy Brief No 4, *ibid.*, pp. 3-4.

³⁷ See, for example, recital 26 of Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal L 24 of 29 January 2004, p. 1.

³⁸ ECJ, judgment of 14 February 1978, 27/76 – United Brands, Reports of Cases 1978, 207, ECLI:EU:C:1978:22, para. 65.

³⁹ Schweitzer/Haucap/Kerber/Welker take a different view on this matter, *ibid.*, p. 30 with footnote 87.

65. The practice of the competition authorities and the German courts is generally consistent with the cited case-law. Thus, the concept of intermediation power is to be welcomed conceptually because it facilitates the determination of market dominance in cases where there are relations of dependence of relevance to competition.⁴⁰ It does not require any amendment of the legal standards at EU level, however.

3.2 “Tipping” of markets – collecting experience of national rules

66. The authors of the report on “Modernising the law on abuse of market power” point out that the tipping of markets towards a monopoly is favoured by the behaviour of platform companies. Some practices, such as exclusivity agreements or most favoured nation clauses (MFN clauses, best price clauses) could be covered by Article 101 TFEU. In the case of unilateral behaviour, in contrast, competition protection can only take effect if the platform company already has a dominant position within the meaning of Article 102 TFEU. However, a monopoly that has been created in a tipped market is practically irreversible. Thus, it should be considered whether the authorities – in the interests of prohibiting platform-specific monopolisation, so to speak – should be authorised to prohibit problematic unilateral conduct that may contribute to the tipping of a market even prior to market dominance.⁴¹

67. European competition law has not yet had any kind of prohibition on monopolisation. In contrast, section 2 of the Sherman Act (15 U.S.C. section 2) includes such a prohibition. This rule is applicable if a person inappropriately hinders competition by creating or maintaining monopoly power. Most of the cases prosecuted under section 2 of the Sherman Act relate to the conduct of a company that has already acquired a leading market position although the provision also prohibits attempting or conspiring to monopolise.⁴²

68. The essential difference between section 2 of the Sherman Act and Article 102 TFEU is that the American prohibition on monopolisation does not specify a particular threshold for intervention, such as the existence of a dominant position. This allows for the threshold for intervention to be handled flexibly, enabling a competition authority to intervene earlier, generally or for a case group. In principle, such flexibility may make sense with regard to practices used by companies to exploit mere economies of scale and – in the case of platforms – network advantages instead of passing on to consumers additional advantages in comparison with competitors (comparative advantages).⁴³ In practice, however, the theoretical flexibility of section 2 of the Sherman Act is counterbalanced by strict requirements of the courts to prove that monopolisation has actually occurred or at least that there is a threat of monopolisation.

69. A similar standard to the prohibition of monopolisation of section 2 of the Sherman Act is the SIEC merger control test. Under this test, merger control serves to prevent certain agreements with structural effects (concentration agreements) “which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position”.⁴⁴ For this merger control test, however, as under Article 102 TFEU, impediments to competition are only relevant if they exceed a legally defined significance threshold. To this extent, dominant position is an orientation standard.⁴⁵

70. Under German law, it is to be considered that significant abuse rules under section 20 (1) and (3) GWB apply even below the level of market dominance.⁴⁶ The authors of the report cited at the beginning of this section pro-

⁴⁰ This position was already taken by the Monopolies Commission in its Policy Brief Issue 4, January 2020, 10th amendment to the Competition Act – meeting challenges in digital *and* regional markets! p. 4 on legal clarifications in German abuse law.

⁴¹ Schweitzer/Haucap/Kerber/Welker, *ibid.*, p. 40; see also *ibid.*, p. 61.

⁴² On this subject: Schweitzer/Haucap/Kerber/Welker, *ibid.*, p. 44.

⁴³ Cf. Steinberg in: Wirtz/Steinberg, WuW 2019, 606 (610).

⁴⁴ Article 2 (3) of Regulation 139/2004; an earlier ruling by the ECJ, judgment of 17 November 1987, 142 and 156/84 – BAT and Reynolds, Reports of Cases 1987, 4487, ECLI:EU:C:1987:490, paras 32 ff.

⁴⁵ For more details of the significance of the SIEC test in the present context: Schweitzer/Haucap/Kerber/Welker, *ibid.*, pp. 45-47.

⁴⁶ On this subject, see Monopolies Commission, Special Report 68, *ibid.*, para. 401; Schweitzer/Haucap/Kerber/Welker, *ibid.*, p. 47.

posed supplementing existing rules by a new special element under which platform companies with superior market power⁴⁷ vis-à-vis competitors and members of close platform oligopolies comprising a few platforms of similar size would be prohibited from abusively impeding competitors if this impediment is likely to facilitate market tipping. Presumptive examples of such impediment could be obstructing the parallel use of platforms (multi-homing) and platform switching.⁴⁸

71. In its draft bill for a Competition Law Digitisation Act, the Federal Ministry for Economic Affairs and Energy proposed a new section 20 (3a) of the Act against Restraints of Competition, which would implement the report's proposal in a modified form and forgo specification of presumptive examples. The rule is intended to enable intervention at a comparatively early stage. The intention is to enable authorities to take action when competition is endangered, regardless of any proof of specific effects of the conduct in question. To this extent, the Ministry underlines that the problem of tipping markets may require speedy intervention to prevent lasting damage to competition.⁴⁹

72. However, it is an open question what the authorities could do if they miss the right time for intervention and the market tips permanently in favour of the platform concerned.⁵⁰ The powers provided for in German law on abuse of a dominant position – to oblige a company to terminate an infringement and to pay a fine – may be unsuitable to remedy damage to competition in such a case. Although the law authorises structural measures, it is questionable whether these would include the subsequent divestiture or unbundling of a platform company that had become dominant if, on account of market tipping, the damage to competition could not be remedied in any other way.⁵¹ In view of the tendencies towards concentration typical in platform markets, it is also questionable whether and when unbundling could be an appropriate means to permanently restore competition in a tipped market in any case.⁵²

73. The German bill does not address these questions. However, it is also very difficult to answer them. The prohibition of monopolisation contained in section 2 of the Sherman Act, which has a broader area of application, is moreover considered to be very difficult to apply.⁵³ An exception applies only to the SIEC test, which, however, is only applied in ex ante proceedings (merger control), whereas abuse control imposes ex post penalties for infringements. Thus, it will be important to see whether the German provision is successful in enabling competition authorities to effectively prevent market tipping. The provision proposed for German law could be used to take action against European platform companies operating in Germany whose behaviour could contribute to the tipping of the markets concerned. In addition, the consultation initiated by the European Commission may also contribute to identifying criteria that could contribute to tipping in the foreseeable future. One advantage of this is that the consultation is being held only on the basis of a description of the problem without prescribing any specific solutions that may later turn out to be too narrow or incomplete.

⁴⁷ Cf. section 20 (3) sentence 1 GWB on this term.

⁴⁸ Schweitzer/Haucap/Kerber/Welker, *ibid.*, pp. 62-63.

⁴⁹ Federal Ministry for Economic Affairs and Energy, draft bill, *ibid.*, pp. 85-86.

⁵⁰ This problem became apparent in the proceeding in case AT.40099 – Google Android regarding search engine markets; on this subject see para. 412 in this Report.

⁵¹ Cf. section 32 (1) in conjunction with section 2 GWB; and Emmerich, who rejects unbundling in Immenga/Mestmäcker, *Wettbewerbsrecht*, volume 2, GWB, 6th edition 2020, section 32 para. 33: "There continues to be no scope for the mandatory unbundling of dominant undertakings [...] on the basis of section 32, since the mere existence of the dominant undertaking does not violate the Act against Restraints of Competition, due to the lack of a prohibition of monopolisation in German law." On the subject of the legal situation at EU level, see Monopolies Commission, Special Report 54, *Strom und Gas 2009: Energiemärkte im Spannungsfeld von Politik und Wettbewerb* (Special Report 54, *Electricity and Gas 2009*), Baden-Baden 2008, paras 489 ff.

⁵² See the cautious position of the Monopolies Commission already in its Special Report 68, *ibid.*, paras 261 ff., 269 ff.

⁵³ Cf. U.S. Antitrust Modernization Commission, *Report and Recommendations*, 2007, p. 83 ff., in particular pp. 91 ff.; https://govinfo.library.unt.edu/amc/report_recommendation/toc.htm (retrieved on 8 May 2020); Hovenkamp, *Federal Antitrust Policy*, 2nd Ed., St. Paul, Minn., 1999, p. 268.

74. In respect of the problem of “tipping markets” the Monopolies Commission considers the options proposed by the European Commission for a New Competition Tool, in particular the third option, to be conducive to achieving the goals in question. They would authorise the European Commission to intervene independently of a dominant position if there is a structural risk to competition (particularly the risk of market tipping).⁵⁴ To prevent competition authorities’ interventions overshooting the mark while still being effective, clear criteria for market developments would have to be identified where markets threaten to become incontestable – beyond trends towards concentration. It must also be underlined that for reasons of proportionality, structural remedies in particular would have to be limited in such cases to resolving as precisely as possible the previously identified structural problem.

3.3 “Ecosystems” – prohibition of abuse of Article 102 TFEU sufficient in principle

75. A cross-market view is required to evaluate ecosystems. A report compiled for the UK Competition and Markets Authority (CMA) therefore spoke out in favour of presuming the “strategic market status” of the companies concerned. This would be defined on the basis of the power position that a platform company has vis-à-vis its users and can exploit to their disadvantage.⁵⁵ In its draft bill for a Competition Law Digitisation Act, the Federal Ministry for Economic Affairs and Energy developed the concept of “paramount cross-market significance”.⁵⁶ The prerequisites for such a cross-market significance should be outlined with reference to criteria that are also relevant for establishing a dominant position.⁵⁷

76. European case-law and, following it, current practice by the competition authorities, base their application of Article 102 TFEU on a different conceptual approach. European case-law does not discuss the issue of market position, but examines whether, within the scope of the behaviour examined, leverage of market power takes place. According to the case-law, abuse can be deemed to have taken place in such a case even when the behaviour examined only has an effect on markets distinct from the dominant markets. According to the European Court of Justice, such leverage of market power is possible at least under “special circumstances”, for example, when the company concerned has a quasi-monopolistic position in a market, also making it “a favoured supplier” in another market.⁵⁸ Following this case-law, the General Court therefore ruled that abusive tying is possible in platform market companies, whereby abusive behaviour has cross-market effects.⁵⁹

77. On the basis of Article 102 TFEU and the national abuse regulations modelled on it, the competition authorities have already prosecuted a number of practices by dominant online platform companies relating to a context where ecosystems were formed or which could become relevant in such a context. For example, the European Commission took action against search engine operator Google for giving more favourable treatment to its own price comparison shopping service that was tied to the search engine (so-called self-preferencing).⁶⁰ In this case, the market for general search services had already tipped in Google’s favour to such an extent that it was difficult or impossible for rivals to compete in the market.⁶¹ In another proceeding, the European Commission took action

⁵⁴ That approach, at least, is the basis of British and other rules; see Crofts, Dominant tech companies may face new EU curbs to stop markets 'tipping' into their laps, MLex of 2 March 2020; “Tipping” tech markets warrant new antitrust tool, Vestager says, MLex of 24 April 2020.

⁵⁵ UK Digital Competition Expert Panel, *ibid.*, para. 2.25 ff. (“powerful negotiating position”); see also para. 2.36 (“unfair or unreasonable conduct by a platform with a strategic market status”).

⁵⁶ Federal Ministry for Economic Affairs and Energy, draft bill, *ibid.*, pp. 9-10, 75 ff. The Federal Ministry for Economic Affairs and Energy clearly drew on ideas in the Furman Report here; see Steinberg in: Wirtz/Steinberg, WuW 2019, 606 (611).

⁵⁷ See Monopolies Commission, Policy Brief No 4, *ibid.*, p. 3.

⁵⁸ ECJ, judgment of 14 November 1996, C-333/94 P – Tetra Pak, Reports of Cases 1996, I-5951, ECLI:EU:C:1996:436, paras 27-29.

⁵⁹ Court of First Instance, judgment of 17 September 2007, T-201/04 – Microsoft, Reports of Cases 2007, II-3601, ECLI:EU:T:2007:289, paras 901, 920 ff., 1339.

⁶⁰ European Commission, decision of 27 June 2017, AT.39740 — Google Search (Shopping).

⁶¹ European Commission, decision of 27 June 2017, AT.39740 — Google Search (Shopping), paras 271 ff.

against tying agreements imposed by Google – on the basis of its dominant position in the Android app store market – on manufacturers of Android equipment to consolidate its dominant position in the market for general web search services and to secure competitive advantages in the market for mobile web browsers.⁶² For its part, the FCO examined under national abuse law whether, through Facebook’s collection of personal data from its own services (WhatsApp, Instagram) and from third-party sources, it strengthens network and lock-in effects to the benefit of its social network service in such a way that competitors are impeded.⁶³ The use of commercial data to impede competitors is the subject of proceedings of the European Commission against Amazon, which are still pending.⁶⁴

78. Beyond that, the Commission ‘Competition Law 4.0’ addressed the subject of competition risks that may exist when dominant platform companies impede the interoperability of products or services or the portability of data, thereby hindering competition.⁶⁵ Such conduct was also the subject of abuse proceedings by the European Commission against Microsoft.⁶⁶ A report by the UK Digital Competition Expert Panel moreover considers it to be problematic when a company with a “strategic market position” insufficiently informs other companies of the extent, quality or success of the service provided or commissioned or impedes them in evaluating the value of this service in some other way.⁶⁷ It is to be noted, however, that companies can exploit information advantages even without having a market power-related scope of action. In order to apply Article 102 TFEU in the cases specified, it would therefore also be necessary to prove the existence of effects on competition that promote market power.

79. The rule proposed by the Federal Ministry for Economic Affairs and Energy for companies with “paramount cross-market significance” for competition (section 19a GWB-E) differs from Article 102 TFEU in a number of ways. Apart from the fact that the provision does not require the platform company concerned to have a dominant position, the criteria for prohibition are limited to certain groups of abuse cases. The burden of proof for justification is explicitly assigned to the companies concerned. The proceedings also take place in two phases and have as their aim prohibition by an authority. The imposition of fines is excluded under the provision.

80. The proposed provision is a far-reaching amendment which, in this form, is not based on the preliminary work of any report and which was not preceded by any public discussion.⁶⁸ It remains to be seen how successful practical implementation of the rule will be. From the point of view of European Union law, the experience of this new provision could be informative in two ways. Where the competition authorities of the Member States or national courts have an obligation to apply Article 102 TFEU in addition to and alongside national competition law (Article 3 (1) sentence 2 regulation (EC) No 1/2003), it remains to be seen whether the revision facilitates or impedes abuse control.⁶⁹ Where the scope of this revision goes beyond Article 102 TFEU, it remains to be seen whether it is a suitable means of effectively closing existing and possibly previously unrecognised regulatory loopholes at European Union level. In this context, the Monopolies Commission considers it advisable to gain practical experience before tackling any amendment of European legislation to this effect.

⁶² European Commission, decision of 18 July 2018, AT.40099 – Google Android.

⁶³ FCO, decision of 6 February 2019, B6-22/16 – Facebook, paras 885 ff.; cf. also Monopolies Commission, Special Report 68, *ibid.*, para. 310.

⁶⁴ European Commission, case 40462 – Amazon Marketplace; on this subject, European Commission, press statement of 17 July 2019, IP/19/4291.

⁶⁵ Kommission Wettbewerbsrecht 4.0, *ibid.*, p. 54.

⁶⁶ Commission decision of 24 March 2004, COMP/C-3/37.792 – Microsoft; on this subject, see also Kommission Wettbewerbsrecht 4.0, *ibid.*

⁶⁷ UK Digital Competition Expert Panel, *ibid.*, para. 2.38 and p. 64.

⁶⁸ Monopolies Commission, Policy Brief Nr. 4, *ibid.*, p. 3.

⁶⁹ See Article 3 (1) sentence 2 of Council Regulation (EC) No 1/2003 on implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 of 4 January 2003, p. 1.

81. Consequently, with a view to the problem of “ecosystems”, the Monopolies Commission currently sees no basis for supporting one of the options proposed by the European Commission for a New Competition Tool, to be applicable without establishing an infringement of competition law under Article 102 TFEU. Insofar as the options provide for intervention in case of market dominance, it remains unclear why it should no longer be established that a competitive infringement has occurred. Insofar as the options provide for intervention when there is a structural lack of competition, it is also unclear, at least with a view to ecosystems, why the condition of market dominance should be set aside.⁷⁰

3.4 Platforms as central infrastructures

82. The problem that the market position of large platforms can be consolidated permanently after the tipping of the market or as a result of the formation of ecosystems has been examined in detail in a number of expert reports. The authors have proposed measures of two kinds. One approach was to place dominant platform companies under an obligation to furnish proof that they do not abuse their dominant position within the meaning Article 102 TFEU (section 3.4.1). Another approach was to subject dominant online platform companies to additional obligations specified in detail and to stricter supervision (section 3.4.2). The Monopolies Commission considers the second approach in particular to be conducive to achieving the goals in question and makes supplementary proposals on it (section 3.4.3).

3.4.1 Tightening obligations under abuse law requires amendment of the EU Treaties

83. The authors of the expert report on “Competition policy for the digital era” have derived from the ability of dominant platforms to act as rule-setters a responsibility of those companies to ensure that the rules they choose do not hinder free, undistorted and vigorous competition without objective justification. The rules provided by a dominant platform and institutions should not be anti-competitively exclusive or discriminatory. A dominant platform that sets up a marketplace would also have to ensure equal competitive conditions in this marketplace and might not exploit its rule-setting power to determine the result of competition.⁷¹

84. These considerations would lead to a reversal of the burden of proof. If a dominant platform was suspected of abusing its dominant position under Article 102 TFEU, it would face the risk that the legal assessment of its conduct would remain unclear. In deviation from Article 102 TFEU, this risk would thus be transferred from the authorities to the platform company. This would ensure that potentially abusive practices do not go unpunished in abuse proceedings. However, in case of any unclarity, platform companies’ practices that may not in themselves be abusive might also be prohibited. Implementing the proposals would be likely to require an amendment of the European Treaties since the distribution of the burden of proof is laid down in Article 102 TFEU itself.

3.4.2 Platform regulation for supplementary obligations for dominant platform companies independent of abuse is compatible with Article 102 TFEU

85. The authors of the report “Competition policy for the digital era” at EU level and also the Commission ‘Competition Law 4.0’ in Germany have proposed that online platform companies in markets that have tipped permanently be subjected to special regulation. Under these proposals, behaviour by means of which a dominant company gives preferential treatment to its own services as compared to the conditions for other platform users, thereby creating a prima facie competitive advantage, should be prohibited, subject to substantive justification. This is to apply regardless of any effects of the behaviour on competition. Through such behaviour, the dominant platform

⁷⁰ It is to be emphasised here that this statement by the Monopolies Commission only concerns the problem of the structural lack of competition in markets with structurally secure monopolies. It may be necessary to assess differently the need to act on the problem of oligopoly markets liable to coordination, particularly if they involve indirect horizontal links (common ownership); on this subject, see most recently Monopolies Commission, XXII. Biennial Report, *ibid.*, paras 413 ff. (particularly paras 535 ff.). Concerning the problems of tacit algorithmic collusion, see section 4.2.

⁷¹ Crémer/de Montjoye/Schweitzer, *ibid.*, pp. 4, 62.

company violates the principles of fair competition based on performance. In such a case, it could be presumed that distortion of competition was likely in principle.⁷² The authors of the report “Competition policy for the digital era” consider it to be conceivable that, where self-preferencing has significantly benefitted a platform’s subsidiary in improving its market position vis-à-vis competitors, such remedies might include a restorative element (which is not specified in any more detail).⁷³ In addition, a right to real-time access to all the data required for effective competition in adjacent markets, beyond the scope of Article 20 GDPR (Regulation 2016/679), was thought to be justifiable. The Commission ‘Competition Law 4.0’ underlined that this also would have to apply even when the conditions of the essential facilities doctrine within the scope of Article 102 TFEU have not been fulfilled.⁷⁴

86. The proposals in para. 85 take account of the circumstance that platform companies essentially gain their dominant position through the permanent tipping of markets. The formation of ecosystems can additionally contribute to protecting markets all the more effectively against competition. In tipped markets, platform companies can gain a position similarly uncontested to that of monopolists in a natural monopoly in a regulated network industry (such as a railway/postal company). That means they are no longer under any competitive pressure forcing them to stop giving themselves preferential treatment or to improve the interoperability of their services and the portability of user data, making it easier for users to switch to other providers.

87. One of the things the described proposals have in common is that they all take a market structure that has been permanently impaired where there is no prospect of any competitive advances by third parties to occasion special provisions. Incidentally, similar considerations are to be found in the (older) case-law of the European Court of Justice on the objective of protecting undistorted competition within the meaning of the EU Treaties. According to the relevant case-law, such undistorted competition can

*“be guaranteed only if equality of opportunity is secured as between the various economic operators. [It would not be compatible with this to confer] upon an undertaking the power to determine at will which [services] may be [provided in the market], thereby placing that undertaking at an obvious advantage over its competitors”.*⁷⁵

For this reason, particularly high behavioural requirements apply when, in the relevant markets,

*“the degree of dominance reached [so] substantially fetters competition [...] that only undertakings remain in the market whose behaviour depends on the dominant one.”*⁷⁶

Accordingly, in the given market structure, it may be seen as abusive if a dominant company

*“by an alteration to the supply structure which seriously endangers the consumer’s freedom of action in the market [...] practically [eliminates] all competition.”*⁷⁷

Abusive exclusionary conduct in the above-mentioned sense is also referred to as abuse of market structure.

88. It is likely that the restorative measures considered in the report “Competition policy for the digital era” are often to be categorised in legal terms as “divestitures”. Due to the associated encroachment upon fundamental rights, such measures should in principle be used cautiously and require precise rules. In case of a legal infringe-

⁷² Kommission Wettbewerbsrecht 4.0, *ibid.*, p. 54.

⁷³ Crémer/de Montjoye/Schweitzer, *ibid.*, pp. 67-68.

⁷⁴ Kommission Wettbewerbsrecht 4.0, *ibid.*, pp. 54-55.

⁷⁵ ECJ, judgment of 13 December 1991, 18/88 – RTT/GB-Inno-BM, Reports of Cases 1991, I-5941, ECLI:EU:C:1991:474, para. 25; likewise ECJ, judgment of 6 March 1974, 6 and 7/73 – Istituto Chemioterapico Italiano and Commercial Solvents, Reports of Cases 1974, p. 223, ECLI:EU:C:1974:18, para. 25.

⁷⁶ ECJ, judgment of 21 February 1973, case 6-72 – Europemballage Corporation und Continental Can Company, Reports of Cases 1973, 215, ECLI:EU:C:1973:22, end of para. 26.

⁷⁷ ECJ, judgment of 21 February 1973, 6/72 – Europemballage Corporation und Continental Can Company, Reports of Cases 1973, 215, ECLI:EU:C:1973:22, para. 29; likewise judgment of 3 October 1985, 311/84 – CBEM/CLT and IPB, Reports of Cases 1985, 3261, ECLI:EU:C:1985:394, end of para. 26.

ment, the dimensions of remedies must also be proportionate in order to reverse the effects of the infringement as effectively as possible, while at the same time not exceeding the required measure (proportionality). The Monopolies Commission has been critical in its judgment of the use of restorative remedies in the past when divestitures have been used to deal with abusive practices that had no lasting effects on the market structure.⁷⁸ The situation may be different in the case of abuse by online platform companies, which leads to a further strengthening of concentration trends in the market even after the abusive behaviour has ended (for example, impeding competitors from achieving their own positive network effects).

89. When there is a persistent trend towards concentration to the advantage of one platform, it may be questionable in particular whether remedies with conditions relating to particular sides of the platform are sufficient to enable the market to regenerate. Reestablishing a competitive market structure would require the platform company to be deprived of all the advantages it gained from the illegal conduct on all sides of the platform. To date, the decision-making practice of the competition authorities gives a mixed answer to the question of the effectiveness of the remedies imposed following infringements of competition law by dominant platform companies. In the *Google Android* case, for example, it seems questionable whether the remedies imposed were able to neutralise the advantages Google had gained from its alleged abuse in the general search engine market.⁷⁹ The effectiveness of the remedies imposed in the *Google Shopping* case in relation to the display of competing offers has remained controversial among market participants.⁸⁰ The possible effects of the “internal divestiture” imposed in the Facebook case through amendments to the conditions of use for private users also remain unclear. In this case, however, the suspensory effect of the appeal filed by Facebook was ordered temporarily, which means that the decision could not yet have any effect on the market.⁸¹

3.4.3 The platform regulation: a useful regulatory supplement

90. The Monopolies Commission is of the opinion that when a market structure is structurally impaired, preventive provisions subjecting dominant online platform companies to additional requirements could be based on Article 103 and Article 352 TFEU. To this extent, there is a parallel to the preventive rules of merger control adopted earlier on the basis of the cited case-law on market structure abuse.⁸² The Monopolies Commission aligns itself with the position of the Commission ‘Competition Law 4.0’, according to which a special platform regulation for dominant online platforms would be desirable.⁸³ Such a platform regulation to protect competition could supplement the platform-related rules already issued by the EU to protect the internal market, which intend, among other things, to promote fairness and transparency for business users that have become dependent on online intermediation services.⁸⁴ To this extent, the Monopolies Commission also welcomes the European Commission’s considerations to supplement existing rules for online platforms with a Digital Services Act package.

91. In line with considerations to date, a prohibition on dominant platform companies giving preferential treatment to their own services could be included in the platform regulation, since such prohibitions are a common instrument to protect alternative suppliers in structurally weakened markets (also in regulated network indus-

⁷⁸ Monopolies Commission, Special Report 54, Strom und Gas 2009: Energiemärkte im Spannungsfeld von Politik und Wettbewerb (Monopolies Commission, Special Report 54, Electricity and Gas 2009), Baden-Baden 2008, paras 495 ff.

⁷⁹ See para. 412 in this Report.

⁸⁰ See Lambert et al., letter of 22 November 2018, RE: AT.39740 – Google Search (Comparison Shopping); available at MLex; see also Gambrell, Google’s Top Search Results Spotlight a Narrowing of the Open Web, Bloomberg Businessweek of 23 October 2019.

⁸¹ Düsseldorf Higher Regional Court, order of 26 August 2019, Kart 1/19 (V) – Facebook. The order was overturned by an appeal decision of the Federal Court of Justice (BGH) only shortly before this Biennial Report was handed over and the application was rejected; see BGH, order of 23 June 2020, KVR 69/19.

⁸² Instead, for reasons of harmonisation, for Article 114 TFEU: European Commission, Digital Services Act package, Inception Impact Assessment, Ref. Ares(2020)2836174 – 02/06/2020, p. 3.

⁸³ Kommission Wettbewerbsrecht 4.0, *ibid.*, pp. 52-53.

⁸⁴ See: <https://ec.europa.eu/digital-single-market/en/online-platforms-digital-single-market> (retrieved on 11 April 2020).

tries)⁸⁵. In addition, stricter interoperability and portability obligations for dominant platform companies could be justified. In its Special Report No 68, the Monopolies Commission already followed the European Commission's position that technical interoperability and the open architecture of the internet which this creates are preconditions for being able to use information and communication technologies without restriction.⁸⁶ It also emphasised the competitive significance of data portability to reduce barriers to change and lock-in effects to the disadvantage of platform users.⁸⁷ Not least, these aspects were also taken into account by the FCO in its proceedings against Facebook.⁸⁸

92. In the existing legal framework, Article 20 of the General Data Protection Regulation (GDPR) already sets out specifications enabling data portability. The enforceability of such a user right can be impaired in practice by insufficient harmonisation of the systems between which the data are to be transferred. Before introducing tighter interoperability and portability obligations for dominant platform companies, it therefore appears necessary to assess in the first instance whether the standards already in place have been successful in practice or what deficits have become apparent. The understanding gained should be taken into account in developing the Digital Services Act package.

93. The platform regulation could also be used to regulate restorative measures in more detail, in a similar way to that considered by the European Commission. In contrast to the European Commission's proposals, however, it would make sense from the point of view of the Monopolies Commission for the regulation to make provision both for remedies in cases of abuse by dominant platform companies with lasting effects on market structure and for measures that may have to be taken against infringements of the additional obligations laid down in the platform regulation.⁸⁹ The EU legislator could be guided here by the rules already existing in the Merger Regulation (Regulation 139/2004) and its Implementing Regulation. When unwarranted changes in the market structure occur – in cases of illegal concentrations – the Merger Regulation gives specific instructions to “dissolve the concentration or take other restorative measures”.⁹⁰ In addition, there are rules under which the participating companies can make commitments to prevent a concentration being prohibited on account of the likely disadvantageous changes to the market structure. In this context, the requirements regarding the form of the relevant commitments could be taken into account.⁹¹

94. Specifically, rules would have to be made concerning the conditions under which the sale of parts of the business (also, for example, in the form of enforced access to algorithms or data) may be proportionate and the features the parts concerned must then have (for example, a viable and competitive business, admissibility of alternatives, non-acquisition clauses). As in the Merger Regulation, the platform regulation could specify in case of abuse the conditions under which commitments by the companies concerned are appropriate to enable a decision to be

⁸⁵ See, for example, sections 8 (b), 10-12, 14, 20 (2), 23 (2), 36 (1), 44 (1) of the Railway Regulation Act (Eisenbahnregulierungsgesetz, ERegG), section 19 (2) of the Telecommunications Act (Telekommunikationsgesetz, TKG), section 21 (1) and section 30 (1) sentence 1 no. 4 of the Energy Industry Act (Energiewirtschaftsgesetz, EnWG), section 20 (2) no. 1 of the Postal Services Act (Postgesetz, PostG). On the subject of the parallel structure of the obligations of platform companies and traditional grid industry companies, see, for example, Réponse donnée par la vice-présidente exécutive Mme Vestager au nom de la Commission européenne, FRE-000595/2020, 31 March 2020, https://www.europarl.europa.eu/doceo/document/E-9-2020-000595-ASW_FR.pdf (retrieved on 6 April 2020).

⁸⁶ Monopolies Commission, Special Report 68, *ibid.*, para. 282; specifically in relation to social networks, see also para. 301-302, 311.

⁸⁷ Monopolies Commission, Special Report 68, *ibid.*, paras 79, 105-106, para. 215, 302, 310, 335, 498, 593.

⁸⁸ FCO, decision of 6 February 2019, B6-22/16 – Facebook.

⁸⁹ According to the considerations of the European Commission, remedies in case of abuse should be regulated separately as part of the New Competition Tool; see European Commission, New Competition Tool, Inception Impact Assessment, *ibid.*, p. 3.

⁹⁰ Cf. Article 8 (4) Regulation 139/2004.

⁹¹ On this subject, cf. Article 6 (2), Article 8 (2) of Regulation 139/2004, Articles 20-21 of Implementing Regulation 802/2004; Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267 of 22 October 2008, p. 1; Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation, 5 December 2013.

adopted under Article 9 of Regulation 1/2003 or to justify the termination of proceedings for an infringement within the meaning of the platform regulation.

95. Finally, it may be necessary to include in the platform regulation rules on competence and procedures. In particular, the procedural rules would have to address the relationship of proceedings for infringements of obligations under the platform regulation and proceedings under Regulation 1/2003 for infringements of competition within the meaning of Articles 101 and 102 TFEU. The fact that, in case of doubt, the competitive pressure on dominant platforms is insufficient to prevent infringements of obligations under the platform regulation (prohibition on giving preferential treatment to one's own services, requirement for interoperability and portability), may also require ongoing monitoring that these obligations are being met.

4 Approaches to resolving the information-related problems

96. The report "Competition policy for the digital era" highlights transparency issues as a feature of the platform economy.⁹² Such problems have been under discussion for some time, both in the platforms' relationship to outsiders⁹³ and also in the relationship of online retailers (for example, retail/booking portals) to private platform users. In its last Biennial Report, the Monopolies Commission dealt with the risk of algorithmic collusion in connection with the relationship between retailers and consumers in online marketplaces.⁹⁴ The FCO and the French competition authority subsequently published their own report on this subject.⁹⁵ The problems discussed are concerned less with evaluating competitive conduct (substantial) than primarily with the possibilities of even identifying conduct that may be abusive (procedural).

4.1 Information asymmetry between platform and authorities

97. The report "Competition policy for the digital era" addresses problems in the platforms' relationship with outsiders. It argues that it may be a competition issue within the meaning of Article 102 TFEU if a dominant platform suggests its response to search queries is driven exclusively by user preferences, whereas in fact the results shown are influenced by the commissions received.⁹⁶ However, the platform company concerned also has an information advantage over the authorities in proceedings to enforce Article 102 TFEU. This is because it may not be possible for the authorities to understand the purposes for which the platform uses the data available to it.⁹⁷

98. The Monopolies Commission has already pointed out in its Policy Brief Issue 4 that the competition authorities have comprehensive powers of information in administrative proceedings at EU level and in Germany.⁹⁸ However, the use of these powers is hampered by the fact that market conditions in the digital sector are changing rapidly and that market players are constantly adapting their behaviour to changing circumstances. This makes it difficult for the authorities to keep pace with the behaviour of the platform companies and other market participants when investigating the facts of the case (moving target). Thus, it may be difficult for the authorities to deduce from the data the information required for a legal assessment, even when they have collected what they consider to be all the data they require from the platform company to judge the case. Under certain circumstances, this means that data from a dominant company's sphere of influence that are essential for a legal assessment may

⁹² Crémer/de Montjoye/Schweitzer, *ibid.*, pp. 63-64; on this subject, see para. 59 of this Report.

⁹³ In the broadest sense, i.e. authorities, commercial platform users (providers of products/services, advertisers) and non-commercial platform users (especially consumers).

⁹⁴ Monopolies Commission, XXII. Biennial Report, *ibid.*, paras 164 ff.

⁹⁵ Autorité de la concurrence/BKartA, Working Paper – Algorithms and Competition, November 2019, https://www.FCO.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.pdf?__blob=publicationFile&v=5 (retrieved on 21 April 2020).

⁹⁶ Crémer/de Montjoye/Schweitzer, *ibid.*, p. 64.

⁹⁷ Monopolies Commission, Policy Brief 4, *ibid.*, p. 5.

⁹⁸ See Article 18 of Regulation 1/2003 and section 59 GWB.

remain hidden. This risk may be to the detriment of platform users, particularly in exploitative situations. Unlike in the case of abusive exclusionary conduct, which impedes alternative offers, no effects of competition outside the platform and its users can be established in the case of such abusive exploitation.

99. The considerations to be found in the Commission documents on the Digital Services Act package in relation to powers for the targeted collection of information vis-à-vis gatekeepers appear to be useful with regard to enforcing Regulation 2019/1150 and the possible introduction of a further-reaching platform regulation. In the view of the Monopolies Commission, however, an extension of authorities' powers would not be sufficient, insofar as the collection of information would take place when competition problems are suspected. As already stated, the authorities already have comprehensive powers of information for the purpose of protecting competition.⁹⁹ It is not their scope that raises problems, but their use.

100. In its Policy Brief, the Monopolies Commission identifies an approach of its own to resolving this issue, however. This can be explained and illustrated in more detail by reference to the example of exploitative abuse under Article 102 TFEU by a dominant platform company with a data-based business model.

101. In examining such exploitative abuse, the starting point is to be found in European case-law on excessive pricing. According to this case-law, an exploitative abuse might lie in

*“charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied [...]. This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin [...] The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products. [O]ther ways may be devised [as well]”.*¹⁰⁰

To sum up, a comparison is to be made of the costs of providing the service and the payment made by the customer in return.¹⁰¹ The legal assessment of any imbalance may be either absolute or relative, for example based on a comparison with the prices in other markets.

102. In principle, this test is also transferable to the data-based business models of online gatekeepers.¹⁰² In relation to such business models, it would also have to be determined whether the company concerned collected more data from the users than were required for providing its service to the respective users.¹⁰³ It is questionable whether it is sufficient for users to want a less extensive data collection if this would also allow for a less efficient service. This is because, when examining an exploitation abuse under Union law, the specific offer of the dominant platform company cannot be compared with unequal offers under competitive conditions.¹⁰⁴ In this process, a

⁹⁹ That even applies when competitive concerns relate to a whole sector and not just to the practices of individual companies; cf. Article 17 (1) sentences 1 and 2 of Regulation 1/2003.

¹⁰⁰ ECJ, judgment of 14 February 1978, 27/76 – United Brands, Reports of Cases 1978, p. 207, ECLI:EU:C:1978:22, paras 250-253; judgment of 11 December 2008, C-52/07 – Kanal 5 and TV 4, Reports of Cases 2008, I-9275, ECLI:EU:C:2008:703, para. 28.

¹⁰¹ Cf. judgment of 11 December 2008, C-52/07 – Kanal 5 and TV 4, Reports of Cases 2008, I-9275, ECLI:EU:C:2008:703, para. 31 (“appropriate balance”).

¹⁰² Cf. Düsseldorf Higher Regional Court, order of 26 August 2019, Kart 1/19 (V) – Facebook, paras 57, 59 (there in the context of the question of causality).

¹⁰³ On this subject, see, for example, Düsseldorf Higher Regional Court, order of 26 August 2019, Kart 1/19 (V) – Facebook, para. 29 ff., particularly paras 32-33.

¹⁰⁴ Cf. in this respect on the basis of German law BGH, press release no. 80/2020 on BGH, order of 23 June 2020, KVR 69/19, where it is pointed out that “considerable parts of private Facebook users [according to the findings of the Federal Cartel Office] want a lower level of disclosure of personal data. If competition in the social network market were to function properly, a corresponding offer would be expected”.

case of abuse to be affirmed *prima facie* could be excluded if there were overwhelming advantages for the consumers concerned.¹⁰⁵

103. Article 102 TFEU assigns the full burden of proof to the authority, even in cases of exploitative abuse. It bears the risk relating to uncertainty in the legal evaluation, even when facts are to be determined from the dominant company's sphere of influence which the company does not disclose on its own initiative and which it may even be able to identify only with great effort or not at all. However, the fact that the authority bears the burden of proof in the case of legal uncertainty does not mean that it must investigate relevant facts even if it is impossible for it to do so. A distinction needs to be made between the substantive burden of proof and the extent of the procedurally regulated obligations to investigate. As far as obligations to investigate are concerned, the case-law of the European Court of Justice does not rule out the possibility, particularly in cases of exploitative abuse, that in the case of a judicial review

*“considerable and at times very great difficulties in working out relevant facts must be taken into account” in favour of the competition authority.*¹⁰⁶

These are practical difficulties, which may hinder investigations by the authorities, particularly in the digital field. Due to the great information asymmetries in this area, it may be unclear to the authorities what information the company can supply in response to a request for information and whether the information supplied is complete. This may also impede the use of coercive instruments. This is because the use of such instruments requires the authority to judge for itself whether the information supplied by the company subject to proceedings is complete and correct.¹⁰⁷

104. On the basis of the fundamental rights within the European Union and the European Convention on Human Rights, European case-law has developed the further procedural principle that the authorities' obligation to investigate incriminating facts is limited. Thus, the company concerned may refuse to disclose the facts concerned. The authority may not use any coercive means to satisfy its fundamental procedural obligation to undertake a comprehensive examination of the facts (so-called official investigation or examination principle). With regard to incriminating facts, however, the specified limitation concerns only the authority's investigations of the infringement as such and the company's corresponding obligation to admit an infringement without delay (privilege against self-incrimination). However, in all other respects, the authority can (and must) continue to investigate all fact-related evidence. In exchange, the company may not refuse to hand out such evidence. This applies even if the evidence can be used to prove that the company concerned or another company has engaged in anti-competitive behaviour.¹⁰⁸ There is thus a likelihood that the company can be obligated by administrative order to disclose evidence on its cost and price calculation and – in the case of data-based business models – on the data it collects.

105. On the other hand, it is for the dominant company to provide justification in its own interest. Failing to make such a presentation could be evaluated to the detriment of the company. In this respect, the authority is not required to undertake any investigations of its own.¹⁰⁹

¹⁰⁵ Cf. ECJ, judgment of 27 March 2012, C-209/10 – Post Danmark, ECLI:EU:C:2012:172, paras 40-41; Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45 of 24 February 2009, p. 7, paras 28 ff. On the whole, see also Monopolies Commission, XXII Biennial Report, *ibid.*, paras 661 ff., in particular paras 665 ff.

¹⁰⁶ Monopolies Commission, Policy Brief, No 4, *ibid.*, p. 5 with reference to the ECJ, judgment of 14 February 1978, 27/76 – United Brands, Reports of Cases 1978, 207, ECLI:EU:C:1978:2227/76, para. 248/257.

¹⁰⁷ Cf. Article 24 (1) (d) of Regulation 1/2003.

¹⁰⁸ ECJ, judgment of 8 October 1989, 374/87 – Orkem, Reports of Cases 1989, 3283, ECLI:EU:C:1989:387, paras 28 ff., particularly paras 34-35; judgment of 25 January 2007, C-407/04 P – Dalmine, Reports of Cases 2007, I-829, ECLI:EU:C:2007:53, para. 34; see also recital 23 of Regulation 1/2003.

¹⁰⁹ Article 2 of Regulation 1/2003; ECJ, judgment of 27 March 2012, C-209/10 – Post Danmark, ECLI:EU:C:2012:172, paras 40-42.

106. With regard to the authority's obligation to investigate, it is likely that a reasonability limit is reached when the authority is unable to investigate the facts concerned itself and the company concerned also has no interest in providing them. The European Court of Justice has not yet expressed an opinion on this category – apart from the statement cited in para. 103. However, it has stated that within the scope of the legal evaluation under article 102 TFEU, the requirements concerning the extent to which evidence needs to be significant in order for proof to be deemed to have been given (standard of proof) may be reduced, depending on the plausibility of the respective factual assumptions. Thus, in the case of price-related abuse, for example, the costs associated with the provision of service may be estimated if necessary.¹¹⁰ In addition, the principles derived from experience confirmed by case-law may reduce the requirements on evidence.¹¹¹

107. This means that Article 102 TFEU does not place demands on evidence above and beyond what the authorities or companies concerned can fulfil with reasonable efforts. That notwithstanding, it may be derived from the case-law on the privilege against self-incrimination cited in para. 104 that the procedural principle of official investigation or examination is also directly enshrined in primary EU law. However, no obligation can be derived from this principle either to investigate the situation beyond what the authorities can achieve with reasonable efforts.

108. Thus, Union law allows leeway for supplementary procedural provisions on data from the sphere of influence of the platform company involved in the proceedings. This leeway is already used within the applicable law with regard to obligations to cooperate in investigation measures initiated by the European Commission (for example requests for information). However, to date there have been no obligations to cooperate in the sense that a company has to support investigations *ex proprio moto* if conclusions would otherwise have to be drawn in the proceedings that could be disadvantageous for the company. Thus, there is also no European case-law on such obligations. The Europe Court of Justice has ruled that it may be impermissible to exercise coercion to obtain incriminating information. That applies in any case when protected rights thereby are effectively prejudiced.¹¹² However, the Court has held that the fact that a company may be able to avoid a more disadvantageous decision on the basis of its voluntary decision to cooperate does not qualify as the exercise of coercion.¹¹³ The fact that the collaboration concerned would relate to the procurement of evidence, which is enforceable in principle, and not to admission of an infringement is another factor indicating compatibility with the privilege against self-incrimination recognised by the Court in the present context.

109. German law recognises a privilege against self-incrimination, which, in principle, is stricter than the privilege of EU law because it relates not only to admission to an infringement (the *nemo tenetur* principle; Article 1 (1) in conjunction with Article 2 (1) of the Basic Law (Grundgesetz, GG)).¹¹⁴ In its Policy Brief Issue 4, the Monopolies Commission pointed out that in cases of exploitative abuse, the Federal Court of Justice has ruled in German competition law proceedings that a dominant company still has an obligation

“to transmit data from its sphere of influence to the competition authority which the authority cannot obtain in another reasonable way [...]. If the company refuses to collaborate in this way, the competition authority may

¹¹⁰ ECJ, judgment of 27 March 2012, C-209/10 – Post Danmark, ECLI:EU:C:2012:172, paras 29 ff., particularly paras 31-35; on this subject, see also Kramler, Advanced EU Competition Law Conference, Brussels, 25 November 2019; as cited in: Big tech companies might be facing tougher competition law regulations, Gorissen Federspiel of 28 November 2019; <https://gorissenfederspiel.com/viden/nyheder/big-tech-companies-might-be-facing-tougher-competition-law-regulations> (retrieved on 27 April 2020); Banasevic, ABA Virtual Spring Meeting, 17 April - 1 May 2020, as cited in: Acton: Standard of proving tech abuses should be “practical, reasonable,” EU official says, MLex of 23 April 2019.

¹¹¹ ECJ, judgment of 15 March 2007, C-95/04 P – British Airways, Reports of Cases 2007, I-2331, ECLI:EU:C:2007:166, paras 73, 75.

¹¹² ECJ, judgment of 15 October 2002, C-238/99 P – Limburgse Vinyl Maatschappij and Others, Reports of Cases 2002, I-8375, ECLI:EU:C:2002:582, paras 274-275; ECJ, judgment of 12 January 2017, C-411/15 P – Timab Industries and CFPR, ECLI:EU:C:2017:11, para. 86.

¹¹³ ECJ, judgment of 12 January 2017, C-411/15 P – Timab Industries and CFPR, ECLI:EU:C:2017:11, para. 87.

¹¹⁴ Monopolies Commission, Strafrechtliche Sanktionen bei Kartellverstößen, Special Report 72 (Criminal sanctions for cartel infringements, Special Report 72), Baden-Baden 2015, para. 21.

*draw conclusions from this within the scope of its free assessment of evidence [...]. In an individual case, it may conclude that a certain fact is to be regarded as proven on account of the company's refusal to collaborate.*¹¹⁵

This specific case was about the procurement of the data required to examine pricing factors, which could also provide information about excessive pricing under national abuse law (section 19 (2) no. 2 GWB). In this respect, this ruling also addresses a reasonability limit.

110. The jurisprudence of the Federal Court of Justice could also be used at EU level to shape procedural rules for the investigation of facts to be assessed under Article 102 TFEU. The jurisprudence relates solely to the requirements on factual investigations if there is basically a plausible theory of harm and the authority has to overcome obstacles that are no longer reasonable. On the other hand, it does not change the burden of proof within the evaluation under abuse law. In this specific case, indeed, the Federal Court of Justice explicitly stated that in the context of a cost-based investigation of pricing abuse, the principle under the relevant national legislation continued to apply that

“the authority bears the (substantial) burden of proof for the abuse [...] and only in this context can assess the company's insufficient collaboration.”

Apart from this, there is no indication of any conflict with the privilege against self-incrimination under EU law. Beyond any request for information, the company concerned is only obliged to disclose on its own initiative data the authority is unable to obtain with reasonable effort itself. Also, the obligation only comprises avoiding conclusions on facts that could have a disadvantageous effect on the company in the context of the legal assessment. In contrast, the company retains the freedom to act as it chooses (strictly speaking, this is merely a duty (“*Obliegenheit*”) under German law). Moreover, the company is also under no obligation to immediately admit an infringement.

111. The result of the orientation towards German jurisprudence proposed here comes close to considerations at European Commission level some time before the current consultations on platform legislation with a view to simplifying proceedings without going for a reversal of the burden of proof.¹¹⁶ Whether this could offer the anticipated value added would depend on how successful it was in practice. The provision would only benefit the authorities when they had undertaken all “reasonable” investigation efforts. Consequently, it is conceivable that companies subject to proceedings initially delay such proceedings by supplying unclear or incomplete information, later defending themselves by saying it would have been reasonable for the authority to make more precise or further requests for information. In relation to such objections concerning practicability, it must be taken into account, however, that the proposal made here would not in itself change the comprehensive burden on the authorities to investigate. It would merely give the authorities an opportunity to substantiate why they are able to draw certain conclusions, despite investigative difficulties in the context of producing evidence. To this extent, the proposal serves to extend the powers of the authorities without damaging the legitimate procedural interests of the companies concerned. The fact that companies can intentionally use delaying tactics is a separate problem. In the context of appeal proceedings, the courts should consider whether to shift the reasonability limit to the benefit of the authorities if companies intentionally delay proceedings.

112. The reversal in the burden of proof proposed in the report “Competition policy for the digital era” might also be seen as a means of reducing the authorities' difficulties with regard to data in the sphere of influence of the

¹¹⁵ Federal Court of Justice, decision of 14 July 2015, KVR 77/13 – Water prices Calw II, para. 30.

¹¹⁶ See Villajero, Antitrust in times of upheaval, speech held on 10 December 2019, p. 5; https://ec.europa.eu/competition/speeches/text/sp2019_13_en.pdf (retrieved on 5 April 2020): The burden of proof for the authorities should be reduced, for example by introducing rebuttable presumptions of infringement; Kramler and Banasevic, as cited in footnote 110 (where the subject addressed is requirements on the standard of proof, however). The “proximity of the evidence principle” brought into the discussion by Theofanis Christoforou, Head of Competition and Mergers at the Legal Service of the European Commission, in a presentation entitled “Antitrust in times of upheaval” at the conference of the Competition and Regulation Institute on 10 December 2019, familiar in an international context, may go in a similar direction to the proposal made here (not retrievable online).

platform company involved in proceedings. This proposal may be going too far, however. Firstly, reversing the burden of proof would require an amendment to Article 102 TFEU. Secondly, the information advantages that the platform company has in relation to data in its own sphere of influence affect only the investigation of the facts, not the legal assessment of them. In contrast, the proposal by the Monopolies Commission is more strongly orientated to the difficulties arising in the proceedings.

113. Within the digital economy, the provision proposed by the Monopolies Commission here would primarily have an effect on data-related abuse, where dominant platform companies' information advantages over outsiders may be particularly great. The provision could be decisive in such cases, however. In the example scenarios presented in para. 101-102, the information to be disclosed would have to provide information from the sphere of influence of the company involved in the proceedings on whether that company had collected more data from users than was required to provide the service offered to the respective users. It is precisely regarding this information that the company has an information advantage which the authority cannot compensate with reasonable effort. To this extent, there would be a parallel with the calculation of the costs involved in providing the service in traditional cases of price-related exploitative abuse.

114. In principle, the provision proposed here could either be added as a general provision to Article 2 or Article 18 (1) of Regulation 1/2003 or limited to platform companies and included in the platform regulation favoured by the Monopolies Commission. From the point of view of the Monopolies Commission, a provision in a platform regulation is preferable, at least in the first instance, as the scope of the proposed provision beyond cases of abuse by dominant platform companies with a data-based business model cannot currently be foreseen and a provision with limited scope could test whether it is successful in practice. In accordance with the suggested wording in its Policy Brief Issue 4, the Monopolies Commission recommends that the new provision be worded as follows:

“Within the period set in the request for information, companies must also provide the Commission with information from their sphere of influence which the Commission cannot reasonably obtain by other means. If the deadline is missed, the Commission may draw conclusions from this within the framework of its free assessment of evidence and decide on the merits of the case without taking the information not provided into account.”

4.2 Information problems to the disadvantage of consumers in online marketplaces

115. In recent years, there has been much discussion as to whether algorithms can contribute to competition problems. The discussion focuses on two main issues. Firstly, algorithmic collusion, and secondly, the use of algorithms for pricing discrimination. In this context, a question generally addressed only in passing was whether there is a connection between the role of online platform companies and the potential risk of competition problems in connection with the use of algorithms. The authors of the report “Competition policy for the digital era” spoke out in favour of subjecting a dominant platform that sets up a marketplace to an obligation to ensure a level playing field on this marketplace and not to use its rule-setting power to determine the outcome of the competition.¹¹⁷ Thus, they see a risk of platform companies actively interfering with competition on the platform and distorting it.¹¹⁸

116. A further-reaching question is whether platforms in the online sector, particularly online marketplaces, due to their rule-setting capacity presented in detail in the report, could influence the market structure to the effect that algorithmic collusion or price discrimination become more likely. An argument supporting this is that the rules set by the online marketplaces for their users increase market transparency. In addition, market transparency increases with increasing concentration insofar as network effects and consequently concentration trends develop in favour of an online marketplace.

¹¹⁷ Crémer/de Montjoye/Schweitzer, *ibid.*, p. 63.

¹¹⁸ On this subject, see also Monopolies Commission, XXII. Biennial Report, *ibid.*, paras 258 ff.

117. Merchants in online marketplaces are likely to be in a better position than consumers to benefit from this improved market transparency. This is because merchants can invest more money in their algorithms.¹¹⁹ In addition, merchants can use the data available to them to target consumers in a more context-specific and individual way. However, such targeting also enables merchants to find out which consumer groups are probably slower to switch to more attractive offers than others. If consumers do not switch quickly to competitors, price differentiation can be used to make customers pay more than if there were only unit prices, for example. However, if merchants are able to discriminate on price between customer groups, this may suggest that the market is becoming increasingly fragmented, making it necessary for relevant markets to be defined more narrowly.¹²⁰

118. In markets that must be defined so narrowly, more favourable structural conditions for price-related coordination may exist than in larger and less fragmented markets. The probability increases that it is relatively simple to reach agreement on the conditions of coordination, monitor compliance with coordination modalities and take retaliatory measure to punish deviations from the coordinated prices (for example using temporary predatory pricing).¹²¹ Durable success of coordination would then still depend on whether the reactions of outsiders, such as current and future competitors not involved in the coordination and customers, endanger the results anticipated to result from the coordination.¹²² If merchants in the online marketplace are able to maintain price differentiation between customer groups, possibly for a lengthy period, this would indicate that outsiders were unable to do anything about it.

119. If the market conditions *per se* promote coordination, there would be less need for explicit collusion. The use of price algorithms on the merchant side could further reduce this need. Tacit collusion is therefore likely to occur more frequently in the markets concerned than when price algorithms are not used.¹²³ The European Commission took up this aspect in the documents for its consultation on a New Competition Tool, albeit without detailed explanations.¹²⁴

120. In view of the above considerations, the Monopolies Commission regards it to be desirable for the European Commission to include the significance of online marketplaces and the possibilities for price differentiation based on them in the envisaged revision of the Commission Notice on the definition of relevant market for the purposes of Community competition law. The definition of the relevant market has effects on the extent to which a (joint) dominant position of online merchants may be presumed. This is not relevant insofar as prosecution of explicit coordination within the meaning of Article 101 TFEU is concerned. When a narrower definition is applied, however, market dominance is likely to be ascertained more frequently. Restrictions deriving from Article 102 TFEU for tacit price coordination are more frequently applicable than when a wide definition of markets is used. To date, the Notice has not yet addressed in detail the significance of online marketplaces for market definition, however. And while the Notice mentions the significance of the possibilities for price differentiation, the issue receives far less attention than, for example, in the U.S. Horizontal Merger Guidelines.¹²⁵

¹¹⁹ Cf. Monopolies Commission, XXII. Biennial Report, para. 196.

¹²⁰ See already Monopolies Commission, XXII. Biennial Report, *ibid.*, para. 219.

¹²¹ Cf. European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31 of 5 February 2004, p. 5, para. 41 (on the effects of coordinated concentration).

¹²² European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31 of 5 February 2004, p. 5, para. 41.

¹²³ Also Monopolies Commission, XXII. Biennial Report, *ibid.*, para. 199.

¹²⁴ European Commission, New Competition Tool, Inception Impact Assessment, *ibid.*, p. 2 (“oligopolistic market structures with an increased risk for tacit collusion including markets featuring increased transparency due to algorithm-based technological solutions”).

¹²⁵ On this subject, see on the one hand the European Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372 of 9 December 1997, p. 5, para. 43; on the other hand, U.S. DOJ and FTC, Horizontal Merger Guidelines, version of 19 August 2010, section 3.

121. On the other hand, the Monopolies Commission is cautious regarding the considerations of the European Commission on powers of intervention to be available independent of a dominant position when there is a structural lack of competition on oligopoly markets liable to coordination. Under the relevant guidelines, it is precisely in markets with a collective dominant position that effective competition may be significantly impeded because the companies are able to coordinate their conduct (tacit collusion).¹²⁶ Apart from this, however, oligopolistic coordination does not pose a competition problem *per se*, but only when consumers are exploited through excessive prices.¹²⁷ Such cases are already covered by Article 102 TFEU.

122. The Monopolies Commission also pointed out already in its Biennial Report XXII that it is difficult for consumers harmed by coordinated excessive prices to enforce their rights in court. In civil procedures, it is the task of the claimant harmed by the price-fixing and not of the defendants who use the algorithm to prove the effects of price-fixing on the price. There is a statutory presumption of harm to parties damaged by infringements of competition law.¹²⁸ However, these presumptions of harm only take effect in the case of explicit coordination, not in the case of tacit coordination, although the latter may be even more frequent in the case of algorithmic collusion.

123. Following its e-commerce sector enquiry, the European Commission has meanwhile carried out a number of proceedings relating to the use of algorithms in price-related infringements of competition law.¹²⁹ In its report on its assessment of the comparison portal sector, the FCO pointed out that, without access to portals' internal company information, it was impossible for users harmed by comparison portals that use ranking algorithms to prove that the portals had committed a harmful infringement. At present, the internal company information concerned can effectively only be made the subject of administrative proceedings. Likewise, tackling companies' algorithm-based practices is also practically impossible in civil disputes, either on account of business secrets or because proceedings in this area can be very difficult, depending on the complexity of the algorithms used.¹³⁰

124. The Monopolies Commission recalls its recommendation for legislation at national level that consumer organisations be given the right to request an antitrust investigation into certain sectors when there is a suspicion of consumer-damaging collusion due to excessive prices.¹³¹ Apart from that, the Monopolies Commission has proposed a possible extension of the rebuttable presumption that cartel infringements cause harm under Article 17 (2) of Directive 2014/104/EU and the German implementing provision of section 33 (a) (2) GWB to include cases where price algorithms are used in anticompetitive infringements for the purpose of tacit coordination. Following the insight meanwhile gained from European Commission and FCO practice, the Monopolies Commission considers it, indeed, recommendable to make such a revision, but once again to limit its scope of application in the first

¹²⁶ Cf. European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31 of 5 February 2004, p. 5, para. 39; Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265 of 18 October 2008, p. 6, paras 83-85, 120.

¹²⁷ ECJ, judgment of 14 February 1978, 27/76 – United Brands, Reports of Cases 1978, 207, ECLI:EU:C:1978:22, para. 250-253. For reasons of prevention, other provisions must apply in concentration cases; see European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31 of 5 February 2004, p. 5, para. 40. For an overview of the situation, see Monopolies Commission, XXII. Biennial Report, *ibid.*, paras 217 ff.

¹²⁸ Article 17 (2) sentence 1 of Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5 December 2014 p. 1; section 33 (a) (2) GWB.

¹²⁹ See European Commission, cases 40465, 40469, 40181, 40182 – Pioneer and others (2018): Use of algorithms to monitor price maintenance; subsequent to the European Commission, Final report on the E-commerce Sector Inquiry, COM (2017) 229 final, 10 May 2017.

¹³⁰ FCO, Sektor Untersuchung Vergleichsportale, Bericht (Sector Enquiry on comparison websites, report), April 2019, p. 136.

¹³¹ Monopolies Commission, XXII. Biennial Report, *ibid.*, para. 234-236. Since this recommendation is not to be implemented in the planned Competition Law Digitisation Act, the matter has not yet been resolved at national level.

instance to the platform sector and extend its application later if appropriate.¹³² It therefore recommends adopting the following provision in the proposed platform regulation:

“It is presumed that infringements of Article 102 TFEU in the form of automatic excessive pricing cause harm. The infringer has the right to rebut that presumption.”

The recitals to the regulation could clarify that the term “excessive pricing” is to be understood within the meaning of relevant European case-law.¹³³

5 Summary: Competition agenda for the German Presidency of the Council of the European Union

125. The Monopolies Commission derives measures from the recommendations of the expert reports, pursuit of which during the German Presidency of the Council of the European Union could contribute to enabling the European regulatory framework to deal more effectively with dominant online platform companies. The focus here is on the consideration that a special platform regulation subjecting dominant platform companies to additional obligations and stricter supervision beyond Article 102 TFEU could be a useful supplement to the existing Merger Regulation. The Merger Regulation is an instrument that prevents mergers that may result in lasting damage to the market structure. In cases of tipped platform markets, the platform regulation could prevent the risk of dominant platform companies undermining the regeneration of competition and permanently harming consumers.

126. The platform regulation, like the Merger Regulation, could be based on Article 103 in conjunction with Article 352 TFEU. It should subject dominant platform companies notably to a prohibition on giving preferential treatment to their own services and to stricter interoperability and portability obligations. It could also include provisions on restorative measures. With regard to these, rules would have to be made concerning the conditions under which a sale of parts of a business may be proportionate and the features the parts concerned must then have (for example, a viable and competitive business, admissibility of alternatives, non-acquisition clauses). It could also be regulated under what conditions commitments by the companies concerned are appropriate to facilitate a decision on a commitment under Article 9 of Regulation 1/2003 in the case of abuse or to justify the termination of infringement proceedings within the meaning of the platform regulation.

127. In addition, it is likely to be necessary to include in the platform regulation rules on competences and proceedings. In particular, these would have to regulate the relationship of infringement proceedings under the platform regulation, and proceedings under Regulation 1/2003 and provide for the ongoing monitoring of compliance with the special obligations under the platform regulation.

128. The platform regulation could also be supplemented by rules to deal with the problem that platform companies may have non-compensable information advantages vis-à-vis the authorities. In this respect, the Monopolies Commission recommends a provision orientated to the jurisprudence of Germany’s Federal Court of Justice with regard to the obligations of companies involved in proceedings to collaborate. In addition, the platform regulation could be used to take account of the information advantages of merchants on online marketplaces vis-à-vis consumers.¹³⁴ This applies in the context of the possibility of an increased risk of tacit coordination on online marketplaces and of increased consumer prices as a result. This risk could be countered by extending the presumption of

¹³² It should remain an open question at this point whether possibly even a further-reaching regulation could be considered to limit the use of algorithms to determine competitors’ collusive pricing strategies; on this subject, see, for example, Harrington, Developing competition law for collusion by autonomous artificial agents, 14 *Journal of Competition Law & Economics*, 331 (2018).

¹³³ ECJ, judgment of 14 February 1978, 27/76 – United Brands, Reports of Cases 1978, p. 207, ECLI:EU:C:1978:22, Summary section 9 and para. 249 (“Charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied [...] abuse”).

¹³⁴ See above, para. 114 for suggested wording.

harm of Article 17 of Directive 2014/104/EU specifically for the problem of tacit collusion in the field of the platform sector.¹³⁵

129. In the revision of the Commission Notice on the definition of the relevant market for the purposes of Community competition law, attention should be paid to the definition of online marketplaces insofar as price differences suggest that the relevant markets are becoming fragmented.

130. In relation to the new provisions on the “tipping” of platform markets made in the bill for a Competition Law Digitisation Act (section 20 (3a) GWB-E) and on the formation of platform ecosystems (section 19a GWB-E), the Monopolies Commission recommends observing at Union level experiences of the revised rules in Germany in the first instance. To prevent competition authorities’ interventions overshooting the mark while still being effective, clear criteria for market developments would have to be identified when markets threaten to become incontestable, beyond tendencies towards concentration. Under these circumstances, the Monopolies Commission considers in particular the third option proposed by the European Commission for a New Competition Tool, to be conducive to achieving the goals in question.

¹³⁵ See above, para. 124 for suggested wording.